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No. 86-1864

In The
Supreme Court of the United States
October Term, 1986

DAVID COLAN,

Petitioner,

vs.

CUTLER-HAMMER, INC., EATON CORPORATION, and KOPPERS COMPANY, INC.

Respondents

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF IN OPPOSITION

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Dated: June 19, 1987

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QUESTIONS PRESENTED

1. Whether the lower courts properly applied well-established standards articulated in Rule 56 of the Federal Rules of Civil Procedure and by this Court in determining that the petitioner's wholly unsupported and conclusory assertions were insufficient to defeat a motion for summary judgment.

2. Whether certain fragmentary, hearsay notes which could never be admissible at trial were properly disregarded by the lower courts in their summary judgment inquiries.

3. Whether the lack of an irrevocably binding agreement and the continued existence of significant unfulfilled preconditions to a merger preclude the finding of a "sale" under §16(b) of the Securities Exchange Act of 1934.

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BRIEF IN OPPOSITION

STATEMENT OF THE CASE

A. Procedural History

In August 1980, plaintiff-petitioner David Colan ("Colan") filed a complaint against defendant-respondent Koppers Company, Inc.[1] ("Koppers"), alleging that Koppers had violated Section 16(b) of the Securities Exchange Act

[1] Koppers has no parent or non-wholly owned subsidiary corporations.

of 1934, 15 U.S.C. Sec. 78p(b) in the purchase and sale of securities of Cutler-Hammer, Inc. ("Cutler–Hammer"). Colan alleged that the "sale" occurred less than six months after Koppers' last purchase of stock when Koppers supposedly entered in a "secret agreement" with Eaton Corporation ("Eaton"), which acquired Cutler-Hammer through a merger. (SA. 1) Colan, an Eaton shareholder, sued to recover the profits Koppers eventually realized when it actually sold its Cutler-Hammer stock at the closing of the Eaton/Cutler-Hammer merger, long after any six-month §16(b) period.

In October 1981, Koppers filed a motion for summary judgment and, after three years of extensive discovery by Colan, the parties fully briefed the motion. (SA. 2, 3) On May 23, 1986, the District Court granted Koppers' motion and on February 24, 1987, the Court of Appeals for the Seventh Circuit affirmed. Plaintiff now petitions this Court to grant a Writ of Certiorari.

B. Background of the Case

The factual summary contained in the Petition is misleading in its characterizations of the facts and contains unfounded inferences properly rejected by the District Court and the Court of Appeals. A complete statement of the facts is contained in the District Court's Memorandum Opinion and Order and, therefore, only a brief and accurate statement is required herein.

In March 1978, the Chairman of Cutler-Hammer, Edmund L. Fitzgerald, contacted the Chairman of Koppers, Fletcher L. Byrom, to inquire whether Koppers was interested in investing in Cutler-Hammer. Byrom responded that he would have to speak with the Board of Directors, and on March 27, 1978 the Koppers Board met and approved a purchase of Cutler-Hammer stock. (SA. 4, 6) Fitzgerald, who was also an outside director of Koppers, did not attend the board meeting, nor did he participate in any further negotiations between Koppers and Cut-

ler-Hammer concerning the investment. (SA. 4, SA. 5, p. 39-40)

The Cutler-Hammer Board also approved the purchase and created a special preferred stock series entitled to class voting and other rights. (SA. 8) On April 10, 1978 Koppers purchased 650,000 shares of the new preferred stock at $45 per share. Koppers then purchased 742,500 shares of Cutler-Hammer common stock in the open market between April 10 and April 13 at an average price of $44.25 per share. Later, Koppers converted 640,000 preferred shares to common shares, retaining 10,000 shares of preferred stock to preserve its special voting rights. (SA. 7, p. 137-138, 150, 152)

On June 12, 1978, Eaton purchased approximately 30% of Cutler-Hammer's common stock then held by Tyco Laboratories, at a price of $55 per share. On June 26, 1978, the Boards of Eaton and Cutler-Hammer approved a "merger agreement" which proposed the conversion of each common and preferred share of Cutler-Hammer stock into cash or an interest-bearing installment note, at the shareholder's option.

The Eaton/Cutler-Hammer merger agreement had several preconditions to its completion. Specifically, the merger was conditioned upon: (1) the approval of Cutler-Hammer's shareholders, (2) the approval of a Registration Statement by the Securities and Exchange Commission ("S.E.C."), (3) the filing of a proxy statement, (4) antitrust clearance by the Federal Trade Commission and the Department of Justice, (5) the absence of any litigation with regard to the merger, and (6) opinion letters of counsel for both companies and a certificate of Cutler-Hammer's president. (SA. 17; A. 4, p. 117; SA. 18, p. 128)

On July 17, 1978 Eaton issued a tender offer for all outstanding shares of Cutler-Hammer stock and acquired approximately 62% of Cutler-Hammer's common stock. (A. 33) Koppers did not tender or otherwise offer to sell

to Eaton its Cutler-Hammer preferred or common stock.

On August 23, 1978 the Cutler-Hammer Board of Directors tentatively set the required shareholder's meeting for October 2, 1978. The Board also decided that its chairman, Fitzgerald, could later change the date to allow for flexibility in proceeding with the merger. (A. 4, p. 98) Cutler-Hammer's counsel testified that the arbitrary date of October 2 was "pulled out of the air," and Fitzgerald later postponed the shareholder's meeting until December 14, 1978. (SA. 18, 23)

On December 14, 1978 the Cutler-Hammer shareholders approved the merger, subject to the remaining merger conditions. The merger was closed on January 2, 1979 (more than 8 months after Koppers' last purchase) and, at that time, Koppers received $58 per share for all of its Cutler-Hammer stock. (SA. 26)

During discovery, the plaintiff took the deposition of each person who had a significant role in the Eaton/Cutler-Hammer merger and Koppers' purchase and sale of Cutler-Hammer stock. Each person expressly denied there was any "agreement," secret or otherwise, between Eaton, Koppers and Cutler-Hammer to postpone the merger and prevent Koppers from incurring §16(b) liability. (SA. 28, p.195; 5, p.80)

While the plaintiff has claimed at various times that an "unwritten," "informal" and "secret" agreement was reached by August 23, 1978 (the date the Cutler-Hammer Board met and tentatively set the later shareholder's meeting), Fitzgerald testified that he selected the shareholders' meeting and closing dates without considering Koppers and without discussing the matter with Koppers. (SA. 5, p. 80) Fitzgerald and other persons testified that the primary reason for delaying the meeting and closing date was the appearance and later enactment of a new tax bill, to take effect in 1979, which would benefit long-term Cutler-Hammer shareholders (but not Koppers). (SA. 5, p.67, 134;

A. 2, p.58-59; District Court Opinion, Appendix to the Petition, p. 15a)

In responding to Koppers' motion for summary judgment, Colan relied upon certain fragmentary, handwritten notes prepared by two Eaton advisors, as "evidence" of the negotiation of an alleged "secret agreement" involving Koppers, Eaton and Cutler-Hammer. However, the note-takers testified that the notes were "scribbled . . . for memory joggers," that they contained random thoughts and reflected "internal speculations," as opposed to "statements" by anyone. (SA. 29, p. 62-63) Their unreliability is clearly shown by one author who testified, when asked to "explain" his own note:

> "*I suppose* what it means, *I guess, it's a presumption* that . . . " [quoted in Petition at 8] [Emphasis added.].

After careful examination of the notes, the depositions, and other documents, the District Court found that the "notes" offered by the plaintiff were "incomplete, unreliable and ridden with hearsay statements," and that "none of the hearsay exceptions" could apply. (District Court Opinion, p. 14a, fn. 14)

The District Court held, and the Court of Appeals affirmed, that "Colan's conclusory assertion of the existence of a secret agreement is wholly unsupported and fails to establish a genuine issue of material fact even when the facts are viewed in a light most favorable to Colan." (District Court Opinion, p. 13a) The District Court also determined that even assuming such a "secret agreement" existed, it could not constitute a "sale" under Section 16(b) because (a) Koppers was never obligated to dispose of its stock prior to the actual closing, and (b) significant, unfulfilled preconditions to the merger and any sale remained unfulfilled until well after any potential liability period. Accordingly, the District Court granted Koppers' motion for summary judgment and the Court of Appeals

unanimously affirmed, adopting the District Court's opinion as its own.

REASONS FOR DENYING WRIT

I. THE LOWER COURTS PROPERLY APPLIED WELL-ESTABLISHED STANDARDS ARTICULATED BOTH IN RULE 56 AND BY THIS COURT IN DETERMINING THAT THE PETITIONER'S WHOLLY UNSUPPORTED AND CONCLUSORY ASSERTIONS WERE INSUFFICIENT TO DEFEAT A MOTION FOR SUMMARY JUDGMENT

Rule 56(e) of the Federal Rules of Civil Procedure requires that the non-moving party "may not rest upon mere allegations or denials" but instead must "set forth specific facts showing that there is a genuine issue for trial". Nothing in the recent decisions of this Court cited by the petitioner, *Anderson* v. *Liberty Lobby*, ___ U.S. ___, 106 S. Ct. 2505 (1986), and *Celotex Corp.*v. *Catrett*, ___ U.S. ___, 106 S. Ct. 2548 (1986), calls this well-established standard into question, and it is this standard which the District Court and the Court of Appeals used to find petitioner Colan's allegations insufficient to withstand a motion for summary judgment. More specifically, the lower courts found that Colan failed to produce any even potentially admissible evidence to oppose the strong evidence introduced by respondent Koppers that there was no "secret agreement" which constituted a §16(b) "sale."[2] The lower courts therefore granted and affirmed summary

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[2] Absent such an "agreement," there could be no "sale" for §16(b) purposes. However, even if an "agreement" existed, the District Court determined no sale would have occurred. Thus, petitioner's claim that:

> "If the parties did reach such an agreement within the statutory limit of §16(b) liability, then liability for short swing profits would attach."

(Petition at 14), is patently erroneous and ignores the alternative holdings of the lower court. See, Section III, *infra*.

judgment, applying the traditional standards established by the Federal Rules and articulated by this Court.

Petitioner alleges that the District Court and the Seventh Circuit, in deciding the summary judgment motion, "weighed competing evidence" and "resolved credibility issues". (Petition at 15) Petitioner further asserts that the lower courts' decision signals a "confusion" over the proper application of summary judgment standards set forth by this Court in *Anderson* v. *Liberty Lobby, supra*, ___ U.S. ___, 106 S. Ct. 2505 (1986), which decision's language was "misunderstood" by the lower courts. (Petition at 14). However, the District Court did not "weigh the evidence," judge its "credibility" or "misunderstand" anything. Instead, the court examined the evidence and found that petitioner Colan's submission of notes, which the court found to be "incomplete, unreliable and ridden with hearsay statements," did not constitute a sufficient showing to defeat respondent's motion for summary judgment. The District Court clearly and properly stated:

> "On a motion for summary judgment, the moving party has the burden of establishing that there is no genuine issue of material fact and that it is entitled to judgment as a matter of law. [citation] In determining whether any material fact remains in dispute, the court must view all inferences in the light most favorable to the non-moving party. [citation] However, the non-moving party may not rely on conclusory pleadings to withstand summary judgment. In responding to a motion for summary judgment, a non-moving party must set forth specific facts in affidavits or otherwise show that there is a genuine issue of material fact that must be decided at trial. *First National Bank of Arizona* v. *Cities Services Co.*, 391 U. S. 253, 289, 88 S. Ct. 1575, 1952-93 (1968). . . ."

(District Court Opinion, p. 5a-6a) Similarly, the Court of Appeals set forth the same standard in affirming, stating, "We agree with the district court that after drawing all rea-

sonable inferences in the light most favorable to the plaintiff [citation], no genuine issues of material fact exist." (Petition's Appendix, p.2a)

These findings contradict any notion that the lower courts "construed *Liberty Lobby* as an invitation to weigh competing evidence and resolve disputed fact issues." (Petition at 15). Indeed, the District Court's decision was issued a month prior to this Court's decisions in *Celotex* and *Liberty Lobby*. The lower courts only engaged in the normal summary judgment inquiries of determining whether there existed a genuine issue of material fact in the circumstances of this case. Finding none, both courts determined summary judgment would be proper. The present case fails to present any unique or appropriate reason to grant certiorari.

II. FRAGMENTARY NOTES "RIDDEN WITH HEARSAY" WHICH WOULD NEVER BE ADMISSIBLE AT TRIAL WERE PROPERLY DISREGARDED BY THE LOWER COURTS IN DETERMINING THAT NO GENUINE ISSUE OF MATERIAL FACT EXISTED

In opposing Koppers' motion for summary judgment, petitioner Colan produced certain handwritten notes from Eaton advisors. However, as the notes' authors testified, they are incomplete and unreliable, reflecting "internal speculations and 'flitting' thoughts." (District Court Opinion, p. 14a). Moreover, often the notes contain fragments of information from conversations between people other than the note's author. Such double and triple hearsay could never be admissible as evidence at trial. Therefore, the lower courts properly disregarded this alleged "evidence" in their summary judgment inquiries.

An example of this unreliable, inadmissible evidence is a note written by Robert Brown, an Eaton advisor, which petitioner claims shows the negotiation of a secret agreement between Koppers and Eaton. The note is actu-

ally brief words of part of a conversation between Peterson, another Eaton advisor, and Miller, a Koppers advisor. Moreover, Brown did not hear this conversation directly but instead was informed of it by still another person. (A.15, p.1638-41) Although under *Celotex* a nonmovant is not required to produce evidence in a present form that would be admissible at trial, 106 S.Ct. at 2553, even the petitioner concedes the evidence must be admissible *at some point* to be considered by the court. (Petition at 19) However, the "evidence" petitioner presented, like the triple hearsay above, could never be admissible and therefore was properly disregarded by the lower courts.[3] Indeed, petitioner has now apparently abandoned any contention that the notes were admissible under any exception to the hearsay rule.

The lower courts' determination on the notes does not evidence "confusion over the form of evidence the nonmovant must produce in opposition" or a misapplication of *Celotex*, as petitioner claims. (Petition at 20) The lower courts were fully aware of, and properly applied, well-established standards, with which this Court's recent decisions are fully compatible. As stated in *Liberty Lobby*, "if evidence is merely colorable or is not significantly probative, summary judgment may be granted". *Id.* at 2511.

Clearly, evidence which consists entirely of incoherent, virtually undecipherable, and hearsay handwritten notes is not "significantly probative" to withstand a motion for summary judgment. Therefore, the lower courts correctly followed the clear, well-established standards set

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[3] Petitioner's claim that he "could call each of the authors to the stand" and thereby make the contents admissible is nonsense. First, the authors could not even interpret, much less recall their notes. Second, each of the authors expressly *denied* any "secret agreement"- - the interpretation which the plaintiff seeks.

forth in Rule 56 and by this Court.[4]

III. THE LOWER COURTS PROPERLY RULED THAT NO "SALE" BY KOPPERS FOR §16(b) PURPOSES OCCURRED ON THE ALLEGED SALE DATE, WHERE KOPPERS WAS NOT IRREVOCABLY BOUND TO SELL AND WHERE SIGNIFICANT CONDITIONS REMAINED UNFULFILLED

Although the lower courts found no evidence of any alleged "secret agreement" between Koppers and Eaton, they went on to further hold that even if there had been such an agreement, there still would not have been a "sale" for §16(b) purposes. More specifically, the courts found that Koppers was not "irrevocably bound" to dispose of its stock on petitioner's alleged sale date, that significant conditions remained open, and thus no sale could have taken place. In so finding, the District Court and Court of Appeals were fully in accord with other decisions in the Seventh Circuit and other circuits, and no "conflict among the circuits" exists as petitioner now claims.

In support of its finding that Koppers was not irrevocably bound to sell its stock to Eaton the District Court

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[4] It should be noted that the District Court did in fact examine this "merely colorable" evidence and found that even if it had been admissible it still did not "create an issue of material fact as to the existence of a secret agreement between Koppers and Eaton." (District Court Opinion, p. 14a, fn. 14). When reviewed without petitioner's unfounded characterizations, the notes were not inconsistent with the deposition testimony of the participants in the merger negotiations who *all* testified that no secret agreement existed. At most, the notes show concern over whether Koppers might attempt to block or delay the merger through litigation. However, such concern is certainly not evidence of any type of negotiations or agreement between Koppers and Eaton. Thus, even if petitioner's "evidence" is considered, which it should not be, it still does not create an issue of material fact to defeat Koppers' summary judgment motion.

stated,

> "Koppers never signed a contract to sell the shares to Eaton, never pledged its support for the merger or agreed to vote its shares in favor of the merger and Koppers was not a party to the Eaton/Cutler-Hammer Merger Agreement."

(District Court Opinion, p. 23a) In finding no sale because of no irrevocably binding agreement, the lower courts properly followed *Portnoy* v. *Revlon, Inc.*, 650 F.2d 895 (7th Cir. 1981), *Riseman* v. *Orion Research, Inc.*, 749 F.2d 914, 918-919 (1st Cir. 1984) and *Provident Securities Co.* v. *Foremost-McKesson, Inc.*, 506 F.2d 601, 607 (9th Cir. 1974), *cert. denied*, 423 U.S. 1077 (1976). Like the defendant in *Revlon*, Koppers was free to sell its shares until after the §16(b) liability period and, therefore, the District Court was not "rejecting precedent," as petitioner now claims, in granting Koppers' motion for summary judgment.

The decision below was further consistent with *Riseman* and *Provident Securities* in determining whether, on the specific facts alleged, significant preconditions to the merger remained unfulfilled. Although petitioner attempts to dismiss these particular conditions as "insignificant" or "technicalities", the District Court properly found these particular conditions were significant and remained open until after the potential §16(b) liability period was long past.

For example, the absence of threat of litigation remained an open merger precondition until the closing. All of the evidence demonstrated only an informal agreement between the advisors of Koppers and Eaton that they would notify one another before commencing litigation; there was *no evidence* of an agreement whereby Koppers would not sue to block the merger. As stated by the District Court, "Eaton . . . recognized that Koppers could initiate litigation through December of 1978." (District Court Opinion, p. 21a). Moreover, parties other than Kop-

pers could have sued at least until the date of the Cutler-Hammer shareholders meeting in December, 1978. In short, the requirement of lack of litigation remained an open condition until long after the petitioner's alleged "sale date" of August 23, 1978.[5]

Petitioner dismisses all of the preconditions as "insignificant" and then asserts that the lower courts ignored precedent in granting summary judgment. However, these conditions were in fact significant, and as such no sale can take place under §16(b). The lower courts properly followed well-established precedent in granting and affirming Koppers' motion for summary judgment. The precedent as to what constitutes a "sale" is clear and was followed by the district and appellate courts.

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[5] Another significant and unfulfilled condition was the requirement of S.E.C. approval, which petitioner claims was "routine" and "in the hands of Eaton". (Petition at 3) In fact, the S.E.C. returned Eaton's initial application with numerous comments and changes, and approval was not granted until November 3, 1978.

Similarly, the requirement of F.T.C. approval was not an insignificant technicality but instead an explicit, unfulfilled condition as of the date of the alleged secret agreement, August 1978. The F.T.C. directed Eaton and Cutler-Hammer to submit for review certain documents before granting antitrust clearance, and Eaton did not submit the documents until October 20, 1978. F.T.C. approval was not assumed until early December 1978. Like S.E.C. approval, F.T.C. approval was necessary to the merger and not assured until long after any potential §16(b) liability for Koppers.

CONCLUSION

For the reasons set forth herein, the petition for a writ of certiorari should be denied.

Respectfully submitted,

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